United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

74-1521
B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA,

Appellee,

-against-

Docket Number 74-1521

ARTHUR WILLIAM CABRERA,

Appellant.

----------x

On Appeal From The United States District Court For The Eastern District Of New York

---

APPENDIX FOR APPELLANT

LEAVY & SHAW
Attorneys for Appellant
233 Broadway, Suite 3303
New York, New York 10007

Edward N. Leavy
Kenneth S. Birnbaum
Of Counsel

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TABLE OF CONTENTS

APPEAL

CRIMINAL DOCKET **72CR1033**

MISHLER, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES *vs.* ARTHUR WILLIAM CABRERA	CLOSED *For Defendant:* EDWARD LEVY 233 Broadway (233-8991)

Govt requests Westbury Trial
Did fail to report for induction

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED	DISBURSED	
Fine,			4/14/74	Notice of Appeal (no fee)			
Clerk,							
Marshal,							
Attorney,							
Commissioner's Court,							
Witnesses,							

DATE	PROCEEDINGS
8-29-72	Before Bartels J - Indictment filed - Bench Warrant Ordered/Issued
2/2/73	Before MISHLER, CH. J.- Case called-Deft appeared incourt on a Bench Warrant-Counsel present- Bench Warrant vacated-Deft arraigned and enters a plea of not guilty-Bail set at $2,500.00 with cash deposit of $250.00 -Trial set for 6/4/73.
2/2/73	Notice of Appearance filed.
2/5/73	By CATOGGIO, MAG.- Order filed for acceptance of cash bail.
2-7-73	Magistrate's file 73 M 142 inserted into CR file.
3/16/73	Noticeof Readiness for Trial filed.
4/26/73	Financial Affidavit of deft is filed.
4/26/73	Letter of atty EDWARD N. LEAVY filed . re: court appointed counsel
4/26/73	Letter of Ch. J. Mishler, filed dated 4/26/73 re: court appointed counsel (response to Mr. Leavy's letter)

72CR1033

DATE	PROCEEDINGS
6-4-73	Before Mishler, Ch J - Case called for Trial - adjd without date.
7/16/73	Notice of Motion filed , ret. Aug. 3, 1973 re: to dismiss (CABRERA) Memo in support of motion also filed.
8/3/73	Before, MISHLER, CH.J.- Case adjd to 8/17/73 on consent
8/17/73	Before MISHLER, CH.J.- Case called- Adjd to 9/14/73 at 9:30 A.M.
9-10-73	Memorandum of Law filed in oppositon to defts motion to dismiss.
9/14/73	Before MISHLER, CH.J.- Case called- Motion argued(Motion to dismiss)- Decision reserved.
9-21-73	Reply Memorandum to defts supplementary Memorandum filed(CABRERA)
10/30/73	Memorandum of Decision and Order filed denying deft's motion to dismiss the indictment
1-21-74	Before MISHLER, CH J - Case called - deft & counsel Edward Leavy present - Waiver of Jury Trial signed - Trial ordered and BEGUN - Govt rests - Motion by the deft to dismiss the indictment is denied - deft rests - trial concluded - decision reserved - Feb.1,1974 by 4:00 PM to serve and file briefs.
1-21-74	Waiver of Trial by Jury filed.
2-8-74	Stenographers Transcript dated 1-21-74 filed
3-6-74	Before MISHLER, CH J - case called - deft & counsel Edward Leavy present - The court handed down its decision and found the deft not guilty as to count 1 and guilty as to count 2 - bail conditions contd. sentence adjd without date.
3-6-74	By MISHLER, CH J. - Memorandum of Decision and Order filed - deft found not guilty by the court in count 1 and guilty on count 2 - sentence adjd without date.
4-19-74	Before MISHLER, CH J - case called - deft present with counsel E.Leavy - deft sentenced to imprisonment for 3 years pursuant to T-:18, U.S.C.Sec. 3651 - deft to serve 3 months and execution of remainder of sentence is suspended and the deft is placed on probation for 33 months - court advised deft of his right to appeal. Clerk to file Notice of Appeal without fee - sentence stayed pending appeal. Bail conditions continued.
4-19-74	Judgment and Commitment and Order of Probation filed - certified copies to Marshal & Probation.
4-19-74	Notice of Appeal filed (no fee)
4-19-74	Docket entries and duplicate of Notice of Appeal mailed to C of A
4-30-74	Judgment received from the Court of Appeals filed ordering that the recor be docketed on or before May 9, 1974.

72 CR-1033

CRIMINAL DOCKET

DATE	PROCEEDINGS
5-8-74	Govts Trial Memorandum filed.
5-8-74	Supplemental Memorandum of deft filed in support of motion to dismiss.
5-8-74	Reply Memorandum filed to defts supplemental memorandum.
5-8-74	Post Trial Memorandum filed.
5-8-74	Defts Post Trial Memorandum filed in support of acquittal.
5-8-74	Record on Appeal certified and mailed to the Court of Appeals.
5-9-74	Supplemental record on appeal certified and mailed to court of appe (exhibit)
5-10-74	Acknowledgment received from the court of appeals for receipt of re on appeal
5-13-74	Acknowledgment received from the court of appeals and filed for rec supplemental index on appeal

EJB:TRM:alo
F.#715445

B-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

ARTHUR WILLIAM CARRERA,

Defendant.

- - - - - - - - - - - - - - - - - - - X

Cr. No. 72 CR 1033
(50 U.S.C., App., §462(a);
32 CFR 1632.14 and 1628.16)

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 20th day of May 1971, and up to and including the date of the filing of this indictment, within the Eastern District of New York, ARTHUR WILLIAM CABRERA, the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act, as amended, Title 50, United States Code, Appendix, Section 451 et seq., and the Rules, Regulations and Directions made pursuant thereto, in that he being a registrant to whom an order to report for induction had been mailed by his Local Board No. 5, of the Selective Service System, did unlawfully and knowingly fail, neglect and refuse to comply with said induction order and such failure continues to this day. (Title 50 U.S.C. App., §462(a); 32 CFR 1632.14).

COUNT TWO

On or about the 13th day of April 1971, and up to and including the date of the filing of this indictment, within the Eastern District of New York, ARTHUR WILLIAM CABRERA, the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act, as amended (Title 50 U.S.C., App., 451 et seq) and the Rules, Regulations and Directions made pursuant thereto, in that he being a registrant to whom an order to report for an Armed Forces Physical Examination had

been mailed by his Local Board No. 5, did unlawfully and knowingly fail, neglect and refuse to report for his Armed Forces Physical Examination. (Title 50 U.S.C. App., 5462(a); 32 CFR 1628.16.)

A TRUE BILL.

_____

FOREMAN.

_____

UNITED STATES ATTORNEY

Form DJ-195
(Ed. 2-7-66)

No. _____

UNITED STATES DISTRICT **COURT**

EASTERN *District of* NEW YORK

_____ *Division*

THE UNITED STATES OF AMERICA

vs.

ARTHUR WILLIAM CARRUPA,

Defendant.

INDICTMENT

(T.50 U.S.C., App., §462(a);
32 CFR 1632.14 and 1628.16)

A true bill,

_____
Foreman.

Filed in open court this _____ *day*

of _____, *A. D. 19*_____

_____
Clerk.

*Bail, $*_____

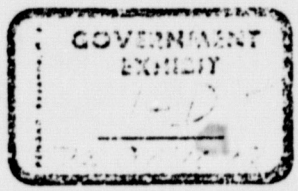
_____

GPO 902-482

T.F. Maher
AUSA 596-3146

C-1

22mA (1)



To Whom it May Concern /

076

During an arest by the Springfield police, my wallet was either lost or stolen by the pigs.

In side of my wallet was the lovely piace of paper that all amerikken young men must have My Draft Card

~~Since~~ Since that horrible Night I just feal naked and dont think I can go with out my Draft card any longer. If you can find it in of our heart to send me a New card I

WELCOME BACK SISTERS and BROTHERS

We all know what kind of fugin jail school really is for all of us. Every fugin day (from September 9th to June 21st) we sit in those hot, burning classes. From day to day we listen to some old teacher screaming at us for day dreaming of the beach, and the freedom we once had.

School is just like a job. We get up at 8:00 in the morning and get out at 3:00 in the afternoon - with weekends off and 2 months vacation in the summer. When we get out of school (work) we go home to eat and be free, but find more fugin work. We receive no pay for a hard day's work, except for A's and B's. It is not possible to live by eating A's and B's. Then why the fug should we bust our ass for nothing?

The prime purpose of these schools is to keep us (kids) under complete control. They program us for themselves, for <u>their</u> own purposes. After the 12 years of processing our minds are so distorted we do all the shit jobs they tell us we should do. We no longer have a mind of our own. We no longer think for ourselves - their vast IBM computers do our thinking for us. It has always been that way for us (kids). We do anything they say, no matter what it is, from fighting with Black and White, brothers and sisters, to killing the Vietnamese brothers and sisters.

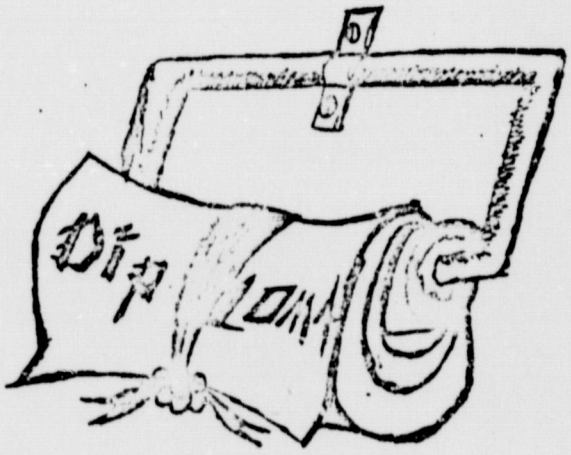
When I think of all the time that has been stolen from us just to prepare us to be fascist pigs like them (cops, landlords, military pigs, politicians, etc), it makes me feel like saying fug off or I will kill you, but we all know that is what they want us to say. To hate everything and everyone, when all that time we could have been learning to love others and helping them to understand us better.

It is time to stand up and demand that we be treated like human beings, and that we have a right to determine the fate of our own lives, but before we can take any course of action, we the students must unite as Sisters and Brothers, to be able to fight off the <u>Oppressor</u>.

UNITE TO FREE SPRINGFIELD

UNITE TO FREE OURSELVES

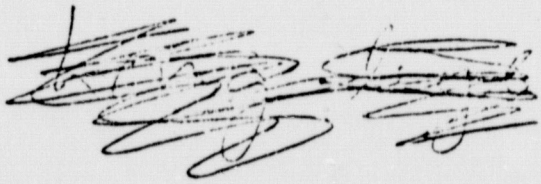
ALL POWER TO THE PEOPLE!!!!!



(2)

Would really try not to get
rested again and take ample
protection against it.

I would also like to congratulate
you
~~you~~ on your wonderful job.
I was reading the paper and
noticed the name of a young
man who I went to school
with was just killed in the
liberation struggle in Vietnam.



Long live Peoples War!

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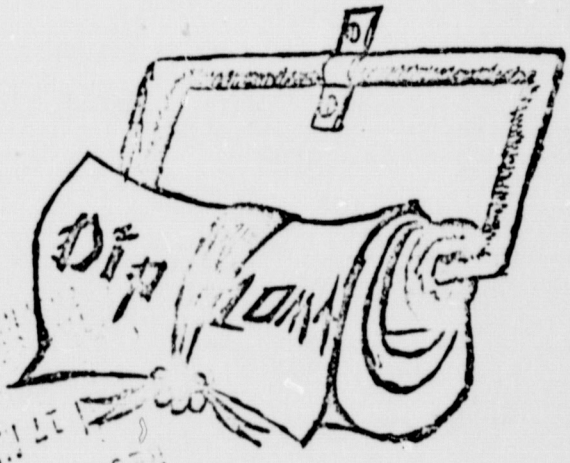

(3)

you can send my
new Card to

Mr A. Cabrera
30 Kimberly Ave.
Springfield, Mass.
01108

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please dont expect me to
ever answer the call of
Uncle KKK Sam!

Death to the facist Pig!

WELCOME BACK SISTERS and Brothers

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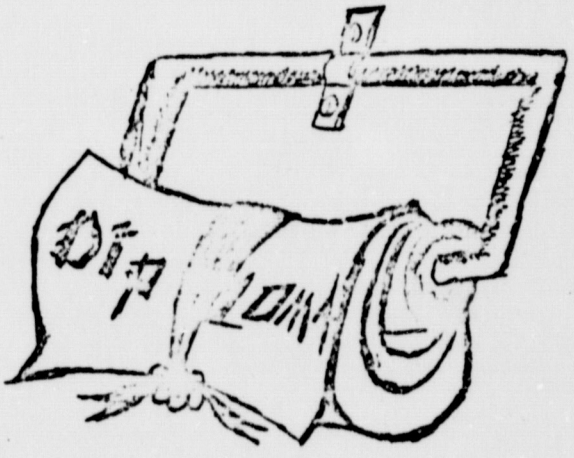
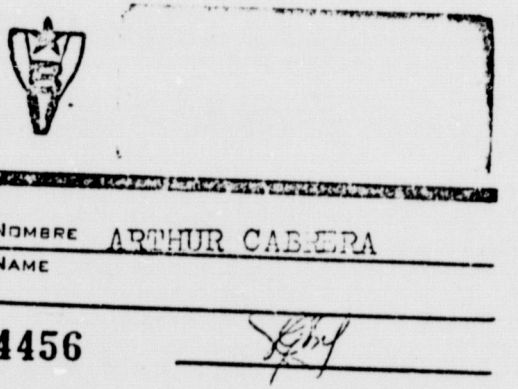
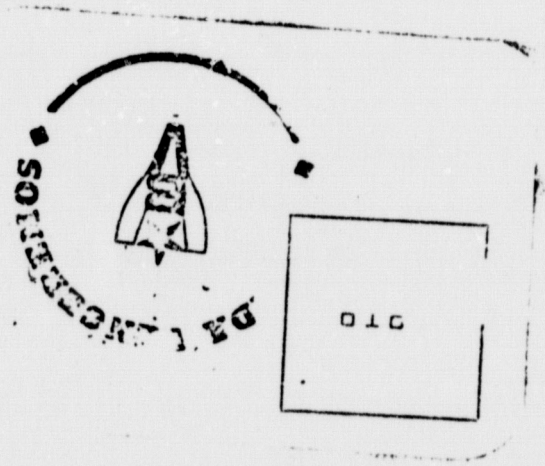




NOMBRE ARTHUR CABRERA
NAME

4456

EXHIBIT 'A'


DTIC

38 mi

June 15, 1917
Springfield, Mass.

1917

To whom it may concern, RFC

I am instructed by a friend that I received two letters from my Sweetheart Agnes Boudin Long Island New York. On my arrival back to the United States of America. Yours [illegible] I have been in Cuba the last two months cutting Cane (sugar) traveling and working for the Venezuela Brigade.

I was a real farmer to return
to the U.S.A. to find out that
I not only recieved my physical
but I also was selected from
all the youth of manitoba to
serve in the Armed forces.
Well, to this I say "death
to all running dogs and their
imperialist lackeys" that means
fuck you. I am a communist revol-
utionary could never serve in

in the U.S. armed forces because of my position as counter-intelligence agents of An Imperialistic government. If the armed forces were built in a democratic way as in Cuba where they all mostly used to take part in the society as a productive human being I would probably join the army. But because of our history off aggression (Cuba "Bay of Pigs" Dominican Republic, Vietnam, Laos, Cambodia, Korea China, the Philipines, certain territorys of Japan, and the way the army + Airforce is used in the U.S.A. as supitis assisans in every rebellion from coast to coast. I feel & not only can't serve in the Armed forces of the U.S.A. but won't.

If you maintain your position on my draft status you will force me to take this matter

to count. I feel that basing my beliefs on historical facts and come to the conclusion I have. I would probably act as an agent or undesirable in the Armed forces of U.S.A. and work as I am now to recruit members of the service & would be placed in to actively take part in the revolutionary struggle that is taking place in the United States of Amerikkka & throughout the world!

Vencremos!

Arthur W. Cabrera Jr.

P.S. Enclosed is a letter addressed to my bro a Vietnamese brother who we eat sugar cane with. We asked him to send it to my Board and tell them to post it for the sake of humanity.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - -

UNITED STATES OF AMERICA

-against-

ARTHUR WILLIAM CABRERA,

Defendant.

- - - - - - - - - - - - - - - - -

72 CR 1033

Memorandum of Decision and Order

March 6, 1974

Defendant is charged with violations of 46 U.S.C. App. § 462(a) and the Rules, Regulations and Directions made pursuant thereto in that defendant: (1) failed to report for induction on or about May 20, 1971 and up to and including the day of the filing of the indictment, i.e., August 29, 1972 (Count 1); and (2) failed to report for a pre-induction physical on or about April 13, 1971 and up to and including the day of the filing of the indictment (Count 2).

The facts are as follows:

Defendant was classified 2S in October, 1969. In December of the same year, defendant was classified 1A.[1]

[1] Defendant had withdrawn from college on November 21, 1969.

On January 23, 1970, Cabrera's local board, located in Hempstead, Long Island, mailed him an order for a pre-induction physical. Cabrera took the physical and was rejected on the basis of pending criminal charges.[2] On July 28, 1970, as a result of these pending charges, the defendant was reclassified 1C. In the interim, in May, 1970, the board received a current information questionnaire (Form 127) filled out by the defendant in which he stated in response to a question regarding his physical and mental condition: "I will not serve in any American service."[3] On October 21, 1970, the defendant sent a letter to his local board requesting a new card. The letter concluded: "Please don't expect me ever to answer the call of Uncle KKK Sam. Death to the Fascist Pig! Arthur W. Cabrera."[4] The board, notified in January, 1971 by defendant's attorney that the criminal charges had been disposed of, reclassified the defendant 1A on February

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[2] Defendant was charged with assaulting an officer, trespassing, disorderly conduct and assault with a dangerous weapon.

[3] Exhibit 1D.

[4] Exhibit 1E.

23, 1971. The following day, the board mailed a notice of reclassification to Cabrera at his Springfield, Massachusetts address. The letter was never returned. On March 23, 1971, the local board mailed the defendant an order for a pre-induction physical to report on April 13th. The order was mailed to Cabrera at his last known address: 30 Kimberly Avenue, Springfield, Massachusetts. The mail was not returned by the Post Office, and there was no indication that the defendant failed to get the order. Defendant did not appear for his physical on the designated date as ordered. On April 23, 1971, the board mailed to defendant an order to report for induction on May 20, 1971. On May 20th, the board was notified that the defendant had failed to report for induction. On June 17, 1971, the board received a letter from the defendant,[5] stating that he had just returned from a stay in Cuba to find out that he had gotten notices for a physical and induction.[6] The remainder of

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[5] Exhibit 1C.

[6] The letter states: "I was just notified by a friend that I received two letters from my Selective Service Board in Long Island, New York. On my arrival back to the United States of Amerikkka.... It was a real bummer to return to the U.S.A. to find out that I not only received my physical but I also was selected from all the youth of Amerikkka to serve in the Armed forces."

the three page letter dealt with why the defendant could not and would not serve in the Armed Forces of the United States.[7] On June 18th, the defendant's file was forwarded to the state headquarters for review and thereupon was sent to the United States Attorney's office. On October 12, 1971, the defendant sent a letter to his local board seeking a new draft card. On October 14th, the local board mailed the defendant a duplicate card. On August 29, 1972, the above indictment was returned.

For reasons of clarity, the court will treat separately the issuance and receipt of the order to a pre-induction physical and the order for induction.

COUNT 2 - ORDER FOR A PRE-INDUCTION PHYSICAL:

The order for a pre-induction physical was mailed by the local draft board in Hempstead, Long Island on March 23, 1971. The stampmark on defendant's passport indicates that defendant entered Cuba from Mexico the following day, March 24, 1971. Defendant's counsel argued that "defendant showed by documentary evidence that he was not at his

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[7] The letter states in part: "Well! To this I say "death to all running dogs and there [sic] imperialist lackeys" that means you!"

address to receive the induction letter when it was mailed."[8] The court need not reach the issue of receipt of the order by defendant prior to his trip to Cuba, since, as discussed below, the court finds proper receipt of this order to have occurred upon defendant's return. Nevertheless, the court wishes to note that, contrary to defendant's contention, documentary evidence does not absolve defendant from the possibility of receipt prior to defendant's entry to Cuba.[9]

50 U.S.C. App. § 462(a), under which defendant is charged, is directed against one "...who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title...or rules, regulations, or directions made pursuant to this title...." The failure to report for a pre-induction

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[8] Defendant's Post Trial Memorandum, pp. 4-5.

[9] The timing of defendant's entry to Cuba was, at best, questionable. Defendant could have received the letter on March 24th and travelled to Cuba by way of Mexico in time to have the passport stamped. Moreover, and more importantly, defendant may well have believed that the order for a physical was on its way and fled to Cuba to avoid receipt. Defendant had originally been classified 1A on December 23, 1969 and was mailed his order for a physical exactly one month later, January 23, 1969. This time defendant had been classified 1A on February 23, 1971 and may have believed, correctly so, that the order for a physical would be mailed exactly one month later.

physical must be done knowingly if it is to be violative of the statute. The knowing failure to perform a statutory duty requires proof of 'the usual criminal intent.' United States v. Johnson, 443 F.2d 189 (2d Cir. 1971); Graves v. United States, 252 F.2d 878, 881-82 (9 Cir. 1958); United States v. Hoffman, 137 F.2d 416, 419 (2d Cir. 1943). To possess the requisite criminal intent, the registrant must be aware of his obligation, United States v. Rabb, 394 F.2d 320 (3 Cir. 1968), and therefore must be given sufficient notice to be able to comply. This criminal intent may be inferred from proven facts and circumstances, Silverman v. United States, 220 F.2d 36, 39-40 (8 Cir. 1955), including the defendant's past conduct, United States v. Leavy, 422 F.2d 1155, 1157 (9 Cir.), cert. denied, 397 U.S. 1076, 90 S.Ct. 1524 (1970) and defendant's statements. United States v. Myers, 410 F.2d 693 (2 Cir.), cert. denied, 396 U.S. 835 90 S.Ct. 93 (1969). The court finds, for the three reasons discussed below, that defendant knowingly failed to report for his pre-induction physical.[10]

[10] The court notes, however, that any of these three reasons would, by itself, justify a finding of criminal intent.

The mailing of the letter by the draft board on March 23rd to the last known address of the defendant creates a presumption of receipt. United States v. Garrity, 433 F.2d 649 (8 Cir. 1970). Defendant correctly contends that this is a rebuttable presumption which places a greater burden upon the government if defendant should bring forth a reasonable doubt of actual receipt. However, defendant has failed in this instance to raise a reasonable doubt to overcome the presumption of receipt. Defendant cites United States v. Smith, 308 F.Supp. 1262 (S.D.N.Y. 1969), in support of its position. In Smith, however, the registrant presented evidence unrebutted by the government that mail in his open and unlocked mailbox in his housing project had been previously stolen, and the court took notice of frequent thefts in such surroundings and under such circumstances. Here the order was mailed to defendant's last known address. The letter was never returned to the draft board. Defendant's June 15th letter to the draft board indicates knowledge of the order to report for the physical. Furthermore, defendant's aforementioned letter, mailed from his old address, indicates that upon return from Cuba, defendant went back to his prior residence to live. Since his mail had not been forwarded to Cuba, one could assume

that he received this letter upon his return. See, United States v. DeNarvaez, 407 F.2d 185, 187 (2 Cir.) cert. denied, 396 U.S. 822, 90 S.Ct. 62 (1969). The court finds the defendant received actual notice of this order and thus possessed the requisite criminal intent to make the act a knowing one.

Moreover, even if defendant never actually received the order to report for a physical, he was made sufficiently aware of his responsibility upon his return, as evidenced in his June 15th letter. Actual receipt of the written order is not required to fulfill the notice requirement and make defendant's refusal to report a knowing one. United States v. Velazquez, Docket No. 73-1869 (2d Cir. December 28, 1973) at 1102; United States v. Abrams, 476 F.2d 1067, 1070 (7 Cir. 1973); United States v. Williams, 433 F.2d 1305, 1306 (9 Cir. 1970). Furthermore, defendant has failed to show how, if indeed he failed to actually receive the order, he was prejudiced by the manner in which he was made aware of his obligation. See United States v. Velazquez, supra, at 1101.

Finally, the court notes defendant's timing in leaving the country,[11] his failure to keep the board

[11] See n. 9, supra.

advised of his address, his failure to notify the draft board of his intended departure from the United States and his failure to obtain permission to do so. All of these factors have a direct bearing on the crucial question of defendant's intent. Silverman, supra. The court finds that defendant intended, by his conduct, to evade an impending duty, which ripened into a present duty. The defendant, in intending to avoid the purpose of the law, acted knowingly. See, Silverman v. United States, supra; see, c.f., Cervantes v. United States, 163 F.2d 294 (9 Cir. 1947).

Delayed receipt of the pre-induction order did not invalidate the order. United States v. DeNarvaez, supra. Furthermore, defendant's continuing obligation to report after the date given in the order[12] is not altered by the

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[12] 32 C.F.R. § 1641.4(b) states in part:

> "Regardless of the time when or the circumstances under which a registrant fails to report for Armed Forces examination when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for Armed Forces examination to his local board and to each local board whose area he enters or in whose area he remains."

delayed receipt of the order. In DeNarvaez, the registrant was in South America when the board sent a letter to his stateside address on March 22nd, ordering the registrant to appear for a physical on April 3rd. The registrant did not re-enter the United States until April 14th and contended that he therefore was not required to report. The court, however, found he had an obligation to report stemming from the March 22nd order and further found it to be a continuing obligation.

> While it is true that the Board mailed the notice to report to appellant at a time when it knew he was in Bogata and while it is also apparent that appellant returned to the United States after the date on which he was to report, it is nonetheless proper to conclude that on his arrival he discovered that he was to have gone for a physical examination on April 3, 1962 because the Board's letter was never returned. Aware that he had that responsibility, it became his continuing duty to so report. 32 C.F.R. § 1628.16(b). /13

As in DeNarvaez, defendant here is charged with a continuing failure to report for the physical, up to the time of the filing of the indictment. As such, if the failure to report was a knowing one at any time up until the indictment, then the requisite criminal intent existed. Silverman v.

/13 407 F.2d at 187.

United States, supra, at 38; see also, Graves v. United States, supra, at 883. Here the defendant had knowledge upon his return from Cuba.

Defendant further contends, however, that certain facts in this case make the finding of a continuous duty to report an improper one. First, Cabrera contends that his expression of refusal to comply with the order did not relieve the Selective Service System of any obligations toward him, and that the Board improperly ceased to attempt to obtain compliance when faced with evidence of his intent not to serve.

The regulation making compliance with an order for a pre-induction physical a continous obligation, 32 C.F.R. § 1641.4(b),[14] is definitive and is not couched in contingencies. Furthermore, the regulations do not require that a registrant be notified of a continuous obligation to report for a pre-induction physical.[15] Local Board Memorandum 106 states that when a registrant fails to report for

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[14] See, n. 12, supra.

[15] See, n. 23, infra, and accompanying text for a discussion of the presumption of defendant's knowledge of this obligation.

a physical, he can be considered acceptable and can be ordered for induction.[16] The minutes of action on Cabrera's file indicate that this procedure was followed. No requirement existed whereby failure to comply with the order would necessitate efforts by the Board to exact compliance. Moreover, there is no indication that the action taken by the Board was influenced by defendant's professed intention not to serve.

In support of his position, defendant relies on United States v. Haug, 150 F.2d 911 (2d Cir. 1945). Examination of this case indicates that defendant's reliance is misplaced. Haug was prosecuted for anticipated action. Here no attempt was made to prosecute defendant for his threatened noncompliance; rather, a procedure followed by the board for all registrants was followed here. The board in no way abridged procedures due Cabrera based upon feelings he had expressed. Defendant further contends that

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[16] See also, 32 C.F.R. § 1628.1(a). This regulation states in part:

> "[A] registrant who has failed or refused to report for and submit to an armed forces examination may have his acceptability determined at the time he reports for induction."

the government's reliance on United States v. Johnson, 443 F.2d 189 (2d Cir. 1971),[17] is misplaced since "the critical difference between Johnson and the case at bar is that Johnson clearly had adequate notice and Cabrera did not."[18] This court has already found, however, that Cabrera received adequate notice. The critical point to be noted in Johnson, and of equal merit here, is that the continuous obligation incurred was in no way altered as a result of the registrant's proclaimed refusal to comply with the order.

Secondly, counsel for defendant contends that the board had the obligation to inform the defendant of his status as a result of Cabrera's correspondence with the board. Specifically, defendant argues that the board's failure to respond in any manner to defendant's June, 1971 letter and the board's limited response to defendant's October, 1971 letter were inconsistent with defendant's continuing obligation, made a knowing choice by defendant impossible, and

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[17] In Johnson, defendant overslept, reported to the board too late for induction and thereupon refused to comply with the order. The court, in finding the defendant guilty of a violation of his continuous duty to report, implied by its conclusion that the board's failure to advise defendant as to his continuous obligation did not relieve defendant of his obligation.

[18] Defendant's post-trial memorandum, p. 5.

and thus terminated the obligation incumbent upon this registrant. As authority for this proposition, the defendant cites United States v. Gross, 5 SSLR 3728 (S.D.N.Y. 1972), where the court found that as a result of inconsistent acts by the draft board, any continuing duty by the registrant had been terminated.

> Even if this Court were to find a continuing duty upon the defendant to ask for a physical examination, the actions of the Board in this case were such as to lead a reasonable person to assume that his duty to take a physical examination had been waived. After the failure to appear for the physical on November 21, 1966 the Draft Board did a number of things which were inconsistent with an understanding that the defendant was still under a duty to report for a physical. (1) The Secretary of the Draft Board told his parents not that he would have to report for a physical on another date, but, rather, that he would be charged with being a delinquent if he had no excuse. (2) The Board entertained a subsequent hardship deferment request. (3) The Board rejected the hardship deferment request but did not order a physical examination. (4) The Board then deferred induction. (5) On the death of the defendant's father the Board did grant a hardship deferment. (6) The Board later withdrew the hardship deferment and reclassified the defendant 1-A without notifying him of his "continuing duty" to take a physical examination./19

The inconsistencies in Gross, however, are far different number, magnitude and effect than the board's lone failure

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/19 5 SSLR at 3728-29.

here to respond to a registrant's letter[20] which basically asserted little more than notice of the order and refusal to serve. The court finds that the board's lack of response to this letter in no way misled defendant and furthermore did not affect defendant's continuous obligation to report for the physical.

As to the October, 1971 letter, defendant sought nothing more than a duplicate draft card. This the local board supplied. Defendant never requested any information as to his status, and the board's lack of volunteering such information cannot be interpreted as misleading the defendant. Furthermore, at this point, the file had been turned over to the United States Attorney's office, and as the testimony reveals, it is the custom and practice of the board at this point to suspend all correspondence with the registrant.[21]

Finally, defendant argues that a registrant should be given all relevant information in order to make an intelligent decision, especially "when the Board has reason

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[20] Defendant's letter of June 15, 1971.

[21] Transcript, p. 51.

to believe the registrant was unable to receive the original orders."[22] The board had no reason to believe that the defendant had failed to obtain adequate notice of his order for a pre-induction physical. Moreover, defendant's line of reasoning ignores the basic premise that each registrant is charged with notice of his duties under the Selective Service law, Rusk v. United States, 419 F.2d 133, 135 (9 Cir. 1969); United States v. Van Cleve, 4 SSLR 3494 (D. Minn., August 30, 1971),[23] including the requirement of a continuous obligation to report.

The defendant, knowing he had an obligation to report for a pre-induction physical, chose to ignore it. This court finds that defendant Cabrera wilfully and knowingly failed to perform his continuing duty of reporting for a pre-induction physical.

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[22] Defendant's Post Trial Memorandum, p. 8.

[23] With the exception of where the government actively misleads the registrant (determined supra by this court to be inapplicable here), defendant's misunderstanding of selective service requirements does not constitute a defense to the charge of failure to comply with an order of the local board. United States v. Powers, 413 F.2d 834, 837 (5 Cir. 1969).

COUNT 1: ORDER FOR INDUCTION

The notice to report for induction was mailed by local board no. 5 on April 23, 1971, ordering defendant to report on May 20, 1971. Defendant, at the time of the mailing and at the time of the reporting date, was in Cuba. Defendant contends that the induction order was invalid, and alternately that if the order was valid, there was insufficient proof of adequate notice.

Defendant claims that issuance of the induction order while defendant was in Cuba is contrary to Local Board Memorandum (LBM) No. 73, and that therefore the order was invalid. Section 5(a) of LBM No. 73 states in applicable part:

> Whenever any registrant is in Cuba, the local board shall postpone the issuance of his Order to Report for Induction (SSS Form 252) until further notice, citing this memorandum as authority./24

The government contends that in order for this memorandum to have effect, the local board must have notice that the

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/24 Defendant's Exhibit B. LBM No. 73 (issued December 17, 1962, as amended February 6, 1968): Processing Registrants who are outside the United States.

registrant is in Cuba. To interpret this memorandum otherwise and allow the board to exercise this authority without such knowledge, argues the government, would be arbitrary. Since the board on April 23rd was unaware of defendant's residence in Cuba, the order for induction did not, according to the government, contravene the memorandum and thus was validly issued.

Inquiry of this court has failed to disclose any cases interpreting LBM No. 73 or any history reflecting the intent of the memorandum. While the memorandum is not a criminal statute, its focal concern before this court is penal in nature and should be strictly construed. The memorandum states that "the local board shall postpone issuance of his Order to Report for Induction...." The word "shall" is to be interpreted as "must." "Taken in its usual and proper sense, the word 'shall' imports a command; it does not permit discretion, but is mandatory and imperative."[25] Moreover, nowhere in the memorandum

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[25] F. McCaffrey, Statutory Construction, § 48. at 105 (1st ed. 1953). Though the presumption that this term was used in its primary sense is a rebuttable one, the government has failed to show that the ordinary meaning of this word will lead to absurd results or is contrary to the intent of its framers.

is the postponement of issuance of the order contingent upon the local board's knowldge of a registrant's whereabouts. The memorandum simply states that an induction order must not be issued when a registrant is in Cuba. Thus in the infrequent instance where, as here, a registrant is in Cuba without the local board's knowledge and the board issues an induction order, the order is issued contrary to the LBM, is violative of Selective Service procedures, and is therefore invalid.

According to the government, the reasoning behind this section of the memorandum is that a ban existed on United States mail going to Cuba. One must thus conclude that with such a ban on mail, the board could not be assured that the order would be received by the registrant, hence the reason for this procedure. However, this difficulty in notifying a registrant in Cuba of the order would exist regardless of whether or not the board was aware that the registrant was in Cuba.

The fact that defendant was not forwarded his mail from Springfield, and thus effectively failed to supply the local board with an address where mail could reach him should not make valid an invalid order under LBM 73. Nor

should the fact that defendant may have gone to Cuba for the purpose of evading service in the armed forces affect eitner: (1) the status of the induction order; or (2) the court's conclusion with respect to this count of the indictment. The postponement of issuance required by Local Board Memorandum 73 is not dependent upon defendant's motive or intent for traveling to Cuba. As such, then, any issuance of an induction order in that period is invalid. Furthermore, one cannot be found guilty of evasion of a duty if the obligation does not exist. Since the order was invalid, no obligation to report for induction existed and thus the defendant did not evade any duty to report for induction.

No continuing obligation can stem from an invalid order. United States v. Guymon, 438 F.2d 635, 636 (9 Cir. 1971). Thus when defendant returned to the United States, he was under no obligation to report for induction based upon the order of April 23rd.

The court finds: (1) that the notice of induction was mailed to the defendant at a time when he was in Cuba; (2) that the notice of induction was issued contrary to Local Board Memorandum No. 73; and (3) that based on LBM

No. 73 the defendant was not obligated to report for induction. The court finds the defendant not guilty in count one.

The court further finds: (1) that defendant was a registrant under the Selective Service Act; (2) that due notice of the pre-induction physical was properly mailed to his last known address; (3) that defendant had knowledge on or about June 15, 1971 of the notice to report for a pre-induction physical; (4) that defendant had a continuing obligation to submit to a pre-induction physical by notifying local board no. 5; (5) and that defendant knowingly failed and refused to report for his pre-induction physical. The court finds the defendant guilty as charged in count two of the indictment.

U. S. D. J.